No.

Supreme Court, U. S.
FILED
MAR 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1342

ELI GUSAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner Eli Gusan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 11, 1977. A timely petition for re-hearing was filed and denied on March 2, 1977.

OPINION BELOW

The decision of the District Court on the motion to suppress is reproduced as Appendix B. The opinion of the Court of Appeals, as yet unreported, is reproduced in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 11, 1977. A timely petition for re-hearing was filed and denied by order of Court on March 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Did the search warrant in question contravene the provisions of the Fourth Amendment by not describing the place to be searched with sufficient particularity.

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Amendment Four, provides

> ". . . No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF FACTS

Petitioner was convicted of two counts of knowingly possessing two (2) illegal firearms in violation of 26 U.S.C. 5861(d) as a result of a written waiver of trial by jury and submission of the case on stipulated facts. He was sentenced to seven (7) years on each count and a fine of Five Thousand ($5,000.00) Dollars, the' sentences to run concurrently. The petitioner expressly reserved his right to appeal from the order of the District Court entered on June 4, 1976, denying his motion to suppress evidence on the ground of unreasonable search and seizure. The sole issue raised upon the appeal and in this petition is limited to the validity of the search warrant.

On March 19, 1976, the Judge of the Gary City Court issued a search warrant which police officers of the City of Gary executed on the same day. The warrant purportedly authorized the search of a 1966 black/yellow Cadillac convertible and the establishment located at 1172 Harrison Boulevard, Gary, Lake County, Indiana, a two story duplex. The affidavit and warrant are reproduced in their entirety as Appendix A.

No issue was raised by petitioner's trial counsel as to the sufficiency of the affidavit to state probable cause. The sole ground relied upon to attack the warrant was that the affidavit and warrant failed to describe the premises to be searched with sufficient particularity to satisfy the requirements of the Fourth Amendment.

An evidentiary hearing was held on the motion to suppress on June 4, 1976. At that hearing, four witnesses testified, three on behalf of the petitioner and one on behalf of the Government. Richard Radakovich, the owner of the building in issue, testified that his building was a four family duplex with two units in the northern part of the building labeled 1172 Harrison and two units in the southern portion of the building denominated as 1176 Harrison. The petitioner occupied the apartment on the upper floor at 1172 and access could ordinarily only be gained by entering the porch at the 1176 portion of the structure. The ground floor at 1172 was a separate apartment not providing general access to the rest of the building. All four units had separate keys, each had their own utility meters. There were three mailboxes on the structure, two on the porch on the south side and one on the porch on the north side. (1172).

Radakovich further testified that he was present when the police officers raided the downstairs apartment at 1172 and that they gained entrance by trying to kick in the door and breaking a glass pane. He also stated that a

separate key was required to gain entrance into the downstairs apartment to 1172 and that he had never given a key to the petitioner for that apartment and the petitioner, to his knowledge, did not have such a key.

Frances Williams, a former tenant of the apartment on the ground floor at 1172 Harrison, testified that she had formerly occupied the lower level apartment for six years, that the petitioner never had a key to her apartment and that he gained access to his apartment through the entrance at 1176.

The petitioner testified that he was arrested approximately three miles from his home and was taken to the building in question. The arresting officers gained access by breaking in the glass in the door on the ground floor at 1172. He further testified that the officers searched all four units in the structure. On cross-examination, he testified that he might have used the 1172 entranceway in February and March of 1976, to check for his mail or see the landlord when the door was open.

The only witness called by the Government was Harold Coombs, one of the police officers involved in the arrest and search. Coombs testified that, before he broke into the building, he tried one of the petitioner's keys but it would not open the door. According to Coombs, the petitioner stated to him that sometimes the key sticks and the petitioner who was handcuffed at the time accommodatingly directed him to go ahead and break the glass in the door. The keys were never produced at the motion to suppress and no evidence was ever adduced that any of the keys in the petitioner's possession would fit the door at the lower level of 1172. He testified that they searched the basement level, the lower level apartment of 1172 and the upstairs apartment. He further stated that the petitioner did have a key which fit and with which he unlocked the door to the petitioner's apartment on the upper level at 1172.

REASONS FOR GRANTING THE WRIT

At the outset it should be observed that the sufficiency of the affidavit and the warrant must be determined from the contents of the warrant itself. *Giordenello* v. *United States,* 357 U.S. 480, 78 S. Ct. 1245 (1958), *Spinelli* v. *United States,* 393 U.S. 410, 89 S. Ct. 584 (1969), *Aguilar* v. *Texas,* 378 U.S. 108, 84 S. Ct. 1509 (1964).

Facts elicited at the evidentiary hearing which were not apparent to the judge or magistrate issuing the warrant cannot provide a basis for probable cause or in this instance to develop specificity as to the premises to be searched. *United States* v. *Roth,* 391 F.2d 507 (7 CA, 1967).

Paragraph 10 of the affidavit for the search warrant describes the premises as "the establishment located at 1172 Harrison Boulevard, Gary, Lake County, Indiana, is a *two story duplex.*" (our emphasis) This in itself should have alerted the police officers that more than one family occupied the structure in question.

The uncontradicted evidence at the hearing on the motion to suppress was that the building was a four family duplex, with two units on the northern part of the building and two units on the southern part of the building. There were two distinct addresses, one 1172 and the other 1176. A photograph which was received in evidence displays the different numbers on the building. Nowhere does the affidavit or the warrant recite that the petitioner occupied any part of the structure.

The uncontradicted evidence also disclosed that there were four separate gas meters affixed to the south portion of the building and three separate mail boxes. That portion of the opinion of the Court of Appeals which recites

> ". . . that the four gas meters were located on the south or 1176 side of the building, that the electric meters were on the west or in the rear of the building and that there were only three mailboxes, two on the front porch on the 1176 side and only one on the front porch on the 1172 side of the premises. Therefore, the police officers could not necessarily have seen, without trespassing, the gas meters on the 1176 or opposite side of the house nor the electric meters at the rear of the house but could have readily have observed only one mailbox at 1172." (opinion, p. 4)

is nowhere supported by the evidence. The meters could have been seen from the sidewalk in front of the building without any necessity for trespassing. The mailboxes and the different numbers on the building were in plain view.

Clearly, the warrant in the instant case was overbroad. It authorized a search of 1172 Harrison without reference to the individual units of that building. It did not even recite that the petitioner occupied any of the units.

A search warrant which is directed against a structure which has multiple units must describe the particular sub-unit against which the search is directed. *United States* v. *Hinton,* 219 F.2d 324 (7 CA 1955). In *Hinton* the warrant merely gave the street address as a description of the place to be searched. The structure was in fact a three-story apartment building with a distinct dwelling unit on each floor. In striking down the warrant based upon a defective description, the Court of Appeals for the Seventh Circuit stated:

> "For purposes of satisfying the Fourth Amendment, searching two or more apartments in the same building is no different than searching two or more completely separate houses. Probable cause must be shown for searching each house or, in this case, each apartment. If such cause is shown there is no reason for requiring a separate warrant for each resident.

> A single warrant may cover several different places or residences in a single building but probable cause must be shown for searching each residence unless it be shown that, although appearing to be a building of several apartments the entire building is actually being used as a single unit.
>
> Federal Courts have consistently held that the Fourth Amendment's requirement that a specific place be described when applied to dwellings refers to a single living unit (the residence of one person or family). Thus, a warrant which describes an entire building when cause is shown for searching only one apartment is void. (Citing cases) The basic requirement is that the officers who are commanded to search be able from the particular description of the search warrant to identify the specific place for which there is probable cause to believe that a crime is being committed. This requirement may be satisfied by giving the address of the building and *naming the person whose apartment is to be searched.* (citing cases)" (our emphasis) 219 F.2d at 325-26.

The evidence was uncontradicted that the police officers searched at least two apartments and, according to the petitioner, searched all four apartments. The lower level apartment was unoccupied but it was searched nonetheless. The fact that the apartments of no innocent persons had actually suffered an unjustified search does not validate the warrant. See *Hinton* v. *United States,* 219 F.2d at page 327; *United States* v. *Esters,* 336 F. Supp. 214, (Eastern District Michigan, 1972)

In *United States* v. *Higgins,* 428 F.2d 232 (7 CA 1970), the Seventh Circuit Court of Appeals again held that a warrant which did not describe the sub-unit is invalid, citing *Hinton* in support of its conclusion. A number of decisions in the Federal Courts have consistently held that a search warrant directed against a multiple occupancy structure will be held invalid if it fails to describe

the particular sub-unit to be searched with sufficient definiteness to preclude a search thereunder of other units located in the larger structures and occupied by innocent persons. *Tynan* v. *United States* (1924, 9 Cir. Alaska) 297 F. 177, *Hogrefe* v. *United States* (1929, 9 CA) 30 F.2d 640, *United States* v. *Barkouskas* (D.C.) 38 F.2d 837, *United States* v. *Mitchell* (D.C.) 274 F. 128, *Kenney* v. *United States* (D.C.) 157 F.2d 442, *Shore* v. *United States* (D.C.) 49 F.2d 519.

The District Judge attempted to justify the warrant on the basis that the warrant itself was sufficiently broad to authorize the search of the first floor, the second floor, and the basement at 1172 Harrison. That argument entirely misses the point. It is precisely the broadness of the warrant which the petitioner attacks. Such a construction renders meaningless the Fourth Amendment's prescription against searches made upon warrants without a particular description of the place to be searched.

The opinion of the Court of Appeals did not attempt to uphold the warrant on that questionable basis. The opinion relies upon facts adduced at the evidentiary hearing to conclude that the petitioner had exercised dominion and control over the vacant apartment and thus justified the search of it by the police. As we stated earlier, facts adduced at an evidentiary hearing which are not before the magistrate or readily apparent to the magistrate cannot be supplied to cure any defects in the warrant. *Giordenello* v. *United States*, 357 U.S. 480, 78 S. Ct. 1245 (1958); *United States* v. *Roth*, 391 F.2d 507 (7 Cir. 1967).

The evidence which the Court of Appeals relies upon to justify the conclusion that the petitioner exercised dominion and control over the otherwise vacant apartment was that the petitioner on rare occasions used the entrance at 1172 when the door was open or to check his mail, clearly an insufficient basis upon which to predicate a

finding of dominion and control over a separate dwelling unit. This conclusion by the Court of Appeals also ignores the uncontroverted evidence of the landlord, Mr. Radakovich, that the police officers gained entry by trying to kick in a door and breaking a glass pane and that the petitioner had never been given a key to that apartment and, to his knowledge, the petitioner never had a key to that apartment.

CONCLUSION

The Court of Appeals for the Seventh Circuit in its opinion has ignored its own decisions in *United States* v. *Hinton*, 219 F.2d 324 (7 CA 1955) and in *United States* v. *Higgins*, 428 F.2d 232 (7 Cir.). The holding of the Court of Appeals in this case is clearly in conflict with decisions of the District of Columbia Court of Appeals.

The overwhelming and uncontroverted evidence on the hearing at the motion to suppress establishes conclusively that the petitioner did not have dominion or control over the lower level apartment nor did the affidavit in the search warrant recite such facts which would justify any inference that he had dominion and control over the lower level apartment. The petitioner was not even named in the warrant as the occupant of any part of the structure. Upholding the warrant in the case at bar constitutes approval of a general warrant—precisely what the Fourth Amendment forbids.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

COHEN AND THIROS
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Of Counsel

APPENDIX

APPENDIX A

STATE OF INDIANA) CITY COURT
) ss:
COUNTY OF LAKE) CITY OF GARY

SEARCH WARRANT

TO any constable, police officer, conservator of the peace, GREETINGS:

WHEREAS, there has been filed with me an affidavit of which the following is a copy:

AFFIDAVIT FOR SEARCH WARRANT

Detective Harold Coombs, being duly sworn on oath, swears that he has good reason to believe, and does believe, that on the premises described at 1172 Harrison Blvd., and a 1966 Black/Yellow Cadillac Conv. Lic. 45 F 2301 Ind (76) in the City of Gary, County of Lake, State of Indiana, there is now concealed certain property namely:

Bet Slips, Records and other Wagering Paraphernalia concerned with a Horse Book Operation in violation of Burns 10-2312, Chapter 23, of The Burns Indiana Statutes Annotated. Which property:

1. Was obtained unlawfully,
2. Is possessed unlawfully,
3. Is used or possessed with intent of being used as the means of committing an offense;
4. Is concealed to prevent an offense from being discovered;

5. Constitutes evidence of an offense or tends to show that a particular person committed an offense.

That the facts and information tending to establish probable cause for issuance of a search warrant are as follows:

1. That I am employed as a Detective for the Gary, Indiana Police Department, and at all times material have been and now am employed. I have been a Gary Police Officer for over twelve years, further, I have previously participated in gambling investigations which involved violations of the Indiana State Gambling Laws.

2. I was assigned along with Detective Fred Bemich of the Gary, Indiana Police Department to investigate an illegal Horse Betting operation that was being conducted out of a house at 1172 Harrison Blvd., Gary, Lake County, Indiana, and a 1966 Black/Yellow Cadillac Conv. bearing Indiana license plate 45 F 230 (76).

3. A typical book operation varies slightly from one geographical location to another and from one bookie to another. Bookmaker is defined as one who determines odds and receives and pays off bets, normally on horse races. A bookmaker is also commonly called a bookie. A typical horse bet is made by the bettor picking a particular horse, racing in a particular race, at a particular horse race track. After determining the horse the bettor wants to bet, he must wager or bet an amount of money that the horse he picked will either win, place or show in the particular race. Depending on the bookie joint, the bettor or bookie writes the bet on a slip of paper, listing the race by a number, the track by a letter, the horse by a number and the amount bet by the numerical amount inserted in a series of three (3) "X's". The amount followed by two "X's" indicates that the horse is bet to win. The amount preceded by and followed by one (1) "X" indicates the horse is bet to place.

The amount preceded by two (2) "X's" indicates the horse is bet to show. The bet is written in duplicate and the money bet or wagered is paid to the Bookie or Bookmaker, the Bookmaker then gives the bettor the duplicate copy of the written wager or bet. This copy serves as a receipt. After the race results are in, the bettor may take the receipt to the bookie and collect his winnings; if the horse he bet in fact, did finish the race as shown on the bet slip. On some occasions a horse may be scratch (scratched) (taken out of the race) prior to the race time. Should this occur, the bettor may take the receipt to the bookie and the bookie will in turn return the amount of the money wagered.

4. I have cause to believe and now believe that the establishment located at 1172 Harrison Blvd., Gary, Lake County, Indiana and a 1966 Black/Yellow Cadillac Conv. bearing 1976 Indiana license plate 45 F 230 registered to Eli Gusan, of 1172 Harrison Blvd., Gary, Lake County, Indiana are being used to conceal certain property, namely bet slips, records and other wagering paraphernalia concerned with a horse book operation in violation of Burns 10-2312, Chapter 23, of the Burns Indiana Statutes Annotated.

5. That a written statement has been given to Detective Harold Coombs by an informant, stating that horse bets have been placed by the informant over the telephone to Eli Gusan by telephoning him at 885-0718 (which is listed to Gusan Real Estate, 1172 Harrison Blvd., Gary, Lake County, Indiana) or placing the bets with him in person. The information further states that Eli Gusan picks up horse bets from different locations inside and outside of the City, and that the informant has seen Eli Gusan with bet slips and large amounts of money on his person.

6. That through surveillance by Detective Harold Coombs and Robert McClure of the Post Tribune, Eli Gusan while driving a 1966 Black/Yellow Cadillac Conv. bearing Indiana license plates 45 F 2301 Ind. 76 was observed on the following dates, making stops at the following locations with the times in parenthesis: March 2, 1976, 3861 Broadway (11:20 A.M.), 4195 Madison Street (11:35 A.M.), 5516 Broadway, Merrillville (11:45 A.M.), 341 East 60th Drive, Merrillville (12:05 P.M.), 5815 Broadway Merrillville (12:08 P.M.), Tiberson Trails Apartments, Merrillville (12:26 P.M.), 1172 Harrison Blvd., Gary (1:05 P.M.).

March 4, 1976

Hunter's Inn, 3861 Broadway, Gary (11:20 A.M.), 4195 Madison Street, Gary (11:48 A.M.), 4535 Broadway, Gary (11:53 A.M.), 5516 Broadway, Merrillville (12:15 P.M.), 5815 Broadway, Merrillville (12:06 P.M.), Magazine Mart, 39th & Broadway, Gary (12:34 P.M.), Tiberon Trails Apartments, Merrillville (12:20 P.M.), 1172 Harrison Blvd., Gary (1:08 P.M.).

March 17, 1976

4195 Madison Street, Gary (11:13 A.M.), 4535 Broadway, Gary (11:27 A.M.), 5516 Broadway, Merrillville (11:34 A.M.), 341 East 60th Drive, Merrillville (11:58 A.M.), 5815 Broadway, Merrillville (11:45 A.M.), Tiberon Trails Apartments, Merrillville (12:10 P.M.), 1172 Harrison Blvd., Gary (12:45 P.M.).

7. That on February 26, 1976, Detective Harold Coombs and Robert McClure of the Post Tribune checked the residence at 1172 Harrison Blvd., Gary, Lake County, Indiana and when they observed the 1966 Black/Yellow Cadillac Conv. bearing license plate 45 F 2301 Ind 76 sitting in front of the house at 1:50 P.M. In fifteen minutes they

observed three male white subjects enter 1172 Harrison Blvd. and in a few minutes came back out. One subject driving a Blue Chevrolet Nova, bearing license plates 96 D 2314 Ind 75 was in the house three minutes and after returning to his car drove north on Harrison Blvd. Detective Harold Coombs and Mr. McClure decided to follow the subject. At the intersection of 5th Avenue and Harrison St., the subject threw something out the window. When Detective Harold Coombs stopped to retrieve the item, it was found to be a brown 3″ x 5″ envelope with the initials J. V. in the upper left corner and the figure 79.20 written below the initials. Since the Blue Nova was registered to a John Vasas and Detective Harold Coombs knew from past experience that bookies sometimes pay off their bets in this manner, the enevelope was kept in evidence.

8. The members of the Gary Police Department have cause to believe that the establishment located at 1172 Harrison Blvd., Gary, Lake County, Indiana and a 1966 Black/Yellow Cadillac Conv. bearing Indiana License plate 45 F 2301 Ind 76 are now being used as a horse betting operation.

9. This affidavit is made for the purpose of securing a search warrant in order that a lawful search of the herein described residence and vehicle, including any lower level of the residence may be made and that the memoranda, bet slips, records and wagering paraphernalia may be seized, all of which are being used in violation of the laws of the State of Indiana.

10. The establishment located at 1172 Harrison Blvd., Gary, Lake County, Indiana is a Two Story Duplex. The exterior walls are white stucco with a dark roof. The entrance to 1172 Harrison Blvd. is a single entrance in the front with an open porch and a single entrance in the rear.

11. At 2/26/76 at 11:30 A.M., an informant telephoned Hunter's Inn, 3861 Broadway, and asked for Marge. She took a horse bet from the informant and returned to her booth. Moments later, Eli Gusan entered and sat with her in the booth and two other informants overheard her relay the bet. She said, "A guy out there wants two on three and five." The bet was for the daily double at Hawthorne: $2 on #3 horse in the first race and #5 horse in the second race. All three of the above informants have worked with Detectives Bemish and Coombs in the last two years and their information has always been reliable.

AND WHEREAS, upon the filing of said affidavit the undersigned finds therefrom that probable cause exists for issuing the search warrant herein.

NOW THEREFORE, you are commanded in the name of the State of Indiana, with necessary and proper assistance, during (the daytime only) (the daytime or the nighttime to prevent the loss, removal or destruction of the property), to enter the premises described in the above affidavit and there diligently search for such property described in the affidavit; and that you bring the property or any part thereof found on such search, forthwith before me to be disposed of according to law.

GIVEN UNDER MY HAND this 19th day of March, 1976.

(signed) Frederick T. Work
JUDGE, GARY CITY COURT
Gary, Indiana

(Filed in Clerk's Office,
March 19, 1976
Claudia Nava-McCain
1301 Broadway
Gary, Indiana
CITY CLERK, GARY, INDIANA)

APPENDIX B

DISTRICT COURT'S DECISION

The Court: Very well. First of all, the basic premise here, notwithstanding my great respect for the author of the McAllister case, and not respecting my own view that Federal Judges don't have a monopoly on understanding the Fourth Amendment—The McAllister says, as I read it, that the Blue River Inn, which is one of the great cultural centers of Shelby County, was the subject of the investigation and a warrant in a public place and that a person found in that public place was not—his person or whole person could not be searched pursuant to that warrant.

I don't think that really has much relevance here except for what it may say generally without warrant.

The question here must be decided by us on the basis of the Federal law and the Federal Court interpretation case of the Fourth Amendment and a preliminary matter—there are two decisions and discussions that I think are right on point.

One is in the very last Federal Reporter Advance Sheets from the Fifth Circuit, and, in fact, I first read this opinion and marked it last night about 11:00 o'clock. It's 530 F. 2d 1198, United States vs. Napoli and its Part 3 of the Opinion. This was an opinion by Judge Godbold.

In this case the search warrant was for the premises known as 3027 Napoleon Avenue—that's what the search warrant said. And Judge Godbold in the Fifth Circuit held that that reference in the search warrant was sufficient to embrace the vehicle parked in the driveway of those premises.

Now let me read what he said here and the authorities that he cited, but I think they are very significant and highly relevant:

"Arguably the language 'being in a large, multi-story wooden-frame residential dwelling' limits the generality of the preceding language. But in search warrants there is no place for 'technical requirements of elaborate specificity once exacted under common law pleadings'."

He cites U.S. vs. Ventresca:

" 'It is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended.' "

In Steele vs. U.S.:

"There can be little, if any, doubt that the intent of the officers in this instance was to seize the controlled package and its contents wherever they might be on the premises at 3027 Napoleon Avenue, whether when taken from the house, retained on the front porch, carried down the steps to the sidewalk, taken to the yard, or removed to an outbuilding or to a vehicle on the premises. The objection of the search was movable contraband. A controlled search for it could not effectively be commences . . ." and so forth.

Now he also cites several other cases that I'm going to mention.

He cites United States vs. Anderson, 485 F. 2d 239 (C.A. 5, 1973), cert. denied, in which a duplex residence with its own grounds was described in a search warrant as 1209 Avenue Q, Apartment B, and the Fifth Circuit held that a search of the flower bed outside the house was valid under the warrant.

Also cited was Brooks vs. U.S., 416 F. 2d 1044 (C.A. 5, 1969), cert. denied. And in it a warrant was issued for the search of the premises known as the lot and cabin of Andy Shaw. A search of both the cabin and of the automobile in which two of the defendants had driven to the cabin turned up many incriminating items was upheld.

Likewise cited was United States vs. Long, 449 F. 2d 288, and this is an Eighth Circuit cause in 1971 in which a trash barrel outside of a building described as almost touching the building was held to be part of the premises to be searched.

Now, frankly, I think all these cases and their facts go further than it's required to go in this case.

What I see in this case is that the authorization was for the search of the premises at 1172, and as I see it, those premises include the basement, the ground floor and the second floor. If those are within the warrant, I don't really think it makes a lot of difference how you get in to 1172, or whatever the street address is—1172 Harrison Boulevard.

The fact that you have to go up a stairway that may be on 1176 really doesn't matter, in my opinion.

There is evidence here, of course, if that is relevant, that the ingress and egress to the upstairs apartment at 1172 was over the line as it's drawn on the diagram into 1176. I really don't think that matters because the evidence is that the search was conducted on 1172, and nowhere else, and the only argument as I see it is that it didn't designate the upstairs apartment on 1172 and the collateral argument is, you have to get to that upstairs apartment by going in on 1176. Although the evidence here is certainly in dis-

pute—if I need to find it, I could and would find that that defendant on occasion used the entrance at 1172 to go into the apartment upstairs at 1172.

Now the last thing that occurs to me that I'm familiar with here that I think is relevant is the statement of Justice Goldberg in the United States vs. Ventresca case, and I'm reading from 85 S. Ct. 341, and it's a 1965 decision. And the comment that interests me, as well as the result of the case—but the comment that interests me is the last full paragraph of the opinion on page 747—Justice Goldberg speaking for a majority of the Court said:

"This Court is alert to invalidate unconstitutional searches and seizures, whether with or without warrant."

And it cites several cases.

"By doing so, it vindicates individual liberties and strengthens the administration of justice by promoting respect for law and order. This Court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or official over-reaching. In our view, the officers in this case did what the Constitution requires. They obtained a warrant. . . ."

It's very important. These are my words now. The fact that a warrant is once obtained is extremely important.

Returning to Justice Goldberg's comment:

"They obtained a warrant from a judicial officer 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the things

to be seized.' It is vital that having done so, their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community."

Frankly, I couldn't say it better. I think to hold this warrant and to interpret it as the defendant would ask us to interpret it, would be going back to interpreting it in other than a common sense fashion and to, in effect, nitpick it. I don't think Justice Goldberg suggested that.

For these reasons, each and all of them, and on the basis of the law that I have outlined, and the facts as I find them to be from the evidence, this hearing—the Motion to Suppress is denied.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1858

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ELI GUSAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
No. H CR 76-57—Allen Sharp, *Judge.*

Argued January 19, 1977—Decided February 11, 1977

Before SWYGERT, SPRECHER and TONE, *Circuit Judges.*

SPRECHER, *Circuit Judge.* The sole issue in this appeal is whether the search warrant contravened the Fourth Amendment by not describing the place to be searched with sufficient particularity.

The defendant, Eli Gusan, was indicted in two counts for knowingly possessing two firearms — a Spitfire .45 caliber machine gun and a Sten MK II machine gun, 9 mm caliber—which firearms were not registered to him, in violation of 26 U.S.C. § 5861(d). Upon a written waiver of trial by jury and submission on stipulated facts, defendant was found guilty and sentenced to seven years and a fine of $5,000 as to each count, the sentences to run concurrently. The defendant expressly reserved his right to appeal from the order of the district court of June 4, 1976, denying his motion to suppress evidence on the ground of unreasonable search and seizure. This direct appeal from the judgment of conviction of August 20, 1976, is limited to the issue of the search and seizure.

The Fourth Amendment provides in part that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Inasmuch as search and seizure cases depend so heavily upon the precise facts involved, we will examine those facts in some detail in order to apply what we believe to be the applicable law.

The affidavit supporting the search warrant was incorporated in its entirety in the search warrant, a copy of which was handed to the defendant upon his arrest and shortly prior to the search of his apartment. Although it has been held that "[i]t is the description in the search warrant, not the language of the affidavit, which determines the place to be searched," *United States* v. *Kaye,* 432 F.2d 647, 649 (D.C. Cir. 1970), here "[t]he affidavit was incorporated into the warrant, and we shall not require that the facts stated in the affidavit be recited again on the face of the warrant when they are served together," *United States* v. *Rael,* 467 F.2d 333, 335 (10th Cir. 1972). *See also, United States* v. *Womack,* 509 F.2d 368, 382 (D.C. Cir. 1975).

The affidavit thus incorporated into the search warrant described the place to be searched in the following language:

(1) "premises described as 1172 Harrison Blvd. . . . in the City of Gary, County of Lake, State of Indiana . . ."

(2) "the establishment located at 1172 Harrison Blvd., Gary, Lake County, Indiana . . ."

(3) "horse bets have been placed by the informant over the telephone to Eli Gusan by telephoning him at 885-0718 (which is listed to Gusan Real Estate, 1172 Harrison Blvd., Gary, Lake County, Indiana) . . ."

(4) Eli Gusan was observed "making stops" on March 2, 4 and 17, 1976 at several addresses and finally at "1172 Harrison Blvd., Gary."

(5) On February 26, 1976 police officers "observed three male white subjects enter 1172 Harrison Blvd." and, following one of those subjects after he left, he was seen throwing out of his automobile window an envelope such as bookies sometimes use to pay off their bets.

(6) "The members of the Gary Police Department have cause to believe that the establishment located at 1172 Harrison Blvd., Gary, Indiana . . . [is] now being used as a horse betting operation."

(7) "This affidavit is made for the purpose of securing a search warrant in order that a lawful search of the herein described residence . . . *including any lower level of the residence* may be made . . ." (Emphasis added.)

(8) "The establishment located at 1172 Harrison Blvd., Gary, Lake County, Indiana is a *Two story Duplex.* The exterior walls are white stucco with a dark roof. *The entrance to 1172 Harrison Blvd. is a single entrance in the front* with a[n] open porch and a single entrance in the rear." (Emphasis added.)

Pursuant to the defendant's motion to suppress, an evidentiary hearing was held before the district court on June 4, 1976, at which time the defendant's principal evidence was the testimony of the owner of the premises which included 1172 Harrison Boulevard. He testified that the building was a two-story stucco duplex, as recited in the search warrant, but that there were four separate apartments: two apartments at 1176 Harrison, which constituted the southern half of the premises and two additional apartments at 1172 Harrison, which constituted the northern half of the premises. He further testified that there were two porches, each with an entrance, on the front or east side of the building; that the southern porch entrance at 1176 provided access to the first and second-story apartments at 1176, as well as to the second-story apartment at 1172; that the northern porch entrance at 1172 provided access to the first-story apartment at 1172; then he himself occupied the first story at 1176, that the defendant leased and occupied the second-story at 1172; and that the second-story at 1176 and the first-story at 1172 were both vacant, the latter for one-and-a-half years prior to the search involved in this case.

The owner of the premises further testified that each of the four apartments was provided with separate keys and with separate gas and electric meters. However, he also testified that the four gas meters were located on the south or 1176 side of the building, that the electric meters were on the west or in the rear of the building, and that there were only *three* mailboxes, two on the front porch on the 1176 side and only one on the front porch on the 1172 side of the premises. Therefore, the police officers could not necessarily have seen, without trespassing, the gas meters on the 1176 or opposite side of the house nor the electric meters at the rear of the house, but could have

readily observed only one mailbox at 1172. Both the owner and the tenant who had vacated the first-story 1172 apartment one-and-a-half years before the search, conceded that access to the second-story 1172 apartment could be gained by entering at the porch at 1172 and going through the first-story apartment to a hallway leading to a stairway which went to the upper apartment and that was the only way one using the 1172 door could get to the second-story 1172 apartment. The owner's credibility was not supported when he testified that he could not recall whether the 1172 entrance was identified by numbers on the building.

Both the defendant and a Gary police detective agreed in their testimony that on March 19, 1976, the defendant was arrested approximately three miles from his apartment at 1172 Harrison Boulevard, was handcuffed, and was taken to the porch entrance at 1172, where the police broke a pane of glass, unlocked the door at 1172 through the broken glass, briefly searched the vacant apartment on the first floor, walked through the apartment to a hall which led to the stairs, went up the stairs to the second-story apartment and, searching it, found 109 items of betting paraphernalia, as well as the two unregistered machine guns which became the subject of the indictment in this case.

The defendant's theory on the motion to suppress was that the search warrant was invalid for lack of particularity in specifying 1172 Harrison Boulevard without indicating which apartment at that address or without indicating 1176 which was the address at which access to the second-story apartment at 1172 was normally gained. The defendant relies primarily on our opinions in *United States* v. *Hinton,* 219 F.2d 324, 326 (7th Cir. 1955), where we held that "a warrant which describes an entire building when cause is shown for searching only one apartment is void," and *United States* v. *Higgins,* 428 F.2d 232 (7th Cir. 1970), where a warrant which described the basement at a certain address where three families occupied separate apartments was held to be defective. At the outset we should note that in both *Hinton* and *Higgins,* searches were made of the apartments of several innocent persons not named in the search warrants, which did not occur here.

The search warrant stated that the police officers observed the defendant enter the premises at 1172 Harrison Boulevard on three occasions. At the hearing a detective testified that he saw the defendant enter the premises through the porch door at 1172 on March 2, 3, 4, 5 and 17, 1976. The defendant himself acknowledged that he occasionally used the 1172 entrance "to check mail or something." Inasmuch as the owner of the premises testified that there were only three mailboxes, and only one of those was at 1172, it is obvious that the defendant used the 1172 mailbox as well as the 1172 entrance for access to that mailbox. The warrant stated that the defendant's telephone was listed as Gusan Real Estate, 1172 Harrison Blvd., Gary; and the 1975 telephone directory for Hammond and nearby communities was introduced at the hearing to prove that fact. Neither the owner of the premises nor the prior tenant of the first floor apartment at 1172 testified that the defendant did *not* use the 1172 entrance at the time shortly prior to the search. The detective testified that after the defendant had been arrested and was in handcuffs, he was taken to the 1172 entrance where he indicated the key which the police should use in opening that door. When the door did not open, defendant said "it sticks sometimes for me" and told the police to break the glass.

The district court said at the conclusion of the hearing:

> . . . I could find and would find that the defendant on occasion used the entrance at 1172 to go into the apartment upstairs at 1172.

Inasmuch as the owner of the premises had testified that the only access between the 1172 porch entrance and the second-story apartment at 1172 was by going through the first-story apartment, as the police had done on March 19, 1976, it was necessary for the defendant to have access to the first-story apartment on the occasions when he used the 1172 entrance. The police therefore had authority to search the vacant apartment on the first floor of 1172 if the search warrant authorized the search. The warrant specifically authorized a search of 1172 Harrison Boulevard, "including any lower level of the residence." The district court found:

> What I see in this case is that the authorization was for the search of the premises at 1172, and as I see it, those premises include the basement, the ground floor and the second floor.

As this court said in *Hinton* at page 326:

> . . . [P]robable cause must be shown for searching each residence unless it be shown that, although appearing to be a building of several apartments, the entire building is actually being used as a single unit.

The defendant, although testifying on his own behalf, did not deny that he had, and used, free access to the vacant first floor apartment in order to reach his second floor apartment. He thus exercised dominion and control over the very area which the police used and searched in order to reach the contraband which they eventually seized in the second floor apartment. The police detective testified that the door separating the first floor apartment from the hall leading to the second floor stairway was unlocked;

the defendant testified that it was hooked on the inside which, if true, would nevertheless enable the defendant to enter the first floor apartment with his key (or through the door, if it was open as he testified), and then go through and out of that apartment via the open or hooked door which he could unhook. Further evidence that this method of ingress into, and dominion over, the first floor apartment was exercised by the defendant is the testimony of the detective, who, upon being questioned by the court, said:

> . . . [T]here is so much junk there [at the 1176 entrance] you couldn't have gotten through 1176 to begin with.

Finally, the search warrant described the entrance of three men, who later discarded betting paraphernalia, through the 1172 door.

The search warrant in this case describes the place to be searched with more specificity than the Supreme Court required in *Steele* v. *United States No. 1,* 267 U.S. 498 (1925), where the warrant described "the garage located in the building at 611 West 46th Street, Borough of Manhattan" and "any building or rooms connected or used in connection with said garage, the basement or sub-cellar beneath the same . . ." The facts as developed revealed that:

> The building searched was a four-story building in New York City on the south side of West 46th Street, with a sign on it: "Indian Head Auto Truck Service —Indian Head Storage Warehouse, No. 609 and 611." It was all under lease to Steele. It was entered by three entrances from the street, one on the 609 side, which is used, and which leads to a staircase running up to the four floors. On the 611 side there is another staircase of a similar character, which is closed, and in the middle of the building is an automobile en-

> trance from the street into a garage, and opposite to the entrance on the south side is an elevator reaching to the four stories, of sufficient size to take up a Ford machine. There is no partition between 611 and 609 on the ground or garage floor, and there were only partial partitions above, and none which prevented access to the elevator on any floor from either the 609 or 611 side. The evidence left no doubt that, though the building had two numbers, the garage business covering the whole first floor and the storage business above were of such a character and so related to the elevator that there was no real division in fact or in use of the building into separate halves. The places searched and in which the liquor was found were all rooms connected with the garage by the elevator.

Id. at pages 502-03.

The Supreme Court held that:

> The description of the building as a garage and for business purposes at 611 W. 46th Street clearly indicated the whole building as the place intended to be searched. It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended. *Rothlisberger* v. *United States,* 289 Fed. 72; *United States* v. *Borkowski,* 268 Fed. 408, 411; *Commonwealth* v. *Dana,* 2 Metc. 329, 336; *Metcalf* v. *Weed,* 66 N. H. 176; *Rose* v. *State,* 171 Ind. 662; *McSherry* v. *Heimer,* 132 Minn. 260.
>
> Nor did the search go too far. A warrant was applied for to search any building or rooms connected or used in connection with the garage, or the basement or sub-cellar beneath the same. It is quite evident that the elevator of the garage connected it with every floor and room in the building and was intended to be used with it.

Id. at page 503.

Virtually the same effect was given to the search warrant here with the addition of the language "including the lower level of the residence." The "lower level" included the first floor apartment directly beneath the defendant's acknowledged residence. Since that area had to be passed through to reach the residence and since the defendant actually used that area in order to reach it, he exercised dominion over the otherwise vacant apartment and justified the search of it by the police in accordance with the language of the warrant authority.

In *United States* v. *Lee,* 448 F.2d 604, 605-06 (7th Cir. 1971), we distinguished *Hinton* in a case where the target gambling operation occupied the second floor but access was gained through the first floor and the warrant encompassed both floors. Finally, the fact that the defendant received his mail at, and listed his address in the telephone directory as, 1172 Harrison Boulevard, is evidence that his use of the 1172 entrance was not an isolated occurrence. *United States* v. *Melancon,* 462 F.2d 82, 92-94 (5th Cir. 1972).

We address a final word to district judges. More than once we have directed that rulings on motions to suppress evidence be supported by findings of fact. While such findings can be made by dictating them into the record, too often that method produces generalities rather than the specific facts we need to perform our function. District judges are again admonished to make specific, detailed findings of fact in ruling on motions to suppress evidence.

The judgment appealed from is affirmed.

AFFIRMED.

SWYGERT, *Circuit Judge*, concurring.

I agree with the majority that "[t]he sole issue in this appeal is whether the search warrant contravened the Fourth Amendment by not describing the place to be searched with sufficient particularity." In resolving this issue, however, the court should look only to whether the affidavit accompanying the search warrant demonstrated that there was probable cause to search the entire premises at 1172 Harrison Boulevard at the time the warrant was issued. In making this inquiry, we may consider facts that must have been apparent to the police at the time they sought the warrant, even if they were not specified in the affidavit. But we may not permit the police or trial courts to use facts that only became apparent after the warrant was issued to support a finding of probable cause for the issuance of the warrant in the first place. *See United States* v. *Roth*, 391 F.2d 507, 509 (7th Cir. 1967).

Therefore, I am disturbed by the majority's extensive reliance on facts that were adduced at the hearing on defendant's motion to suppress. They should be considered only if they must have been obvious to the police at the time the warrant was presented to the magistrate. Under this standard, the defendant's behavior after he was arrested and the fact that the second floor apartment at 1172 Harrison Boulevard could be entered from the porch door marked "1172" only by first going through the first floor apartment are irrelevant in determining whether probable cause existed.

Even if this evidence is excluded, however, I agree with the majority that there was probable cause to search the entire premises at 1172 Harrison Boulevard. The affidavit

reveals that the police had seen the defendant, who was legitimately under suspicion for illegal gambling activities, stop at 1172 Harrison Boulevard on three separate occasions. It is very likely that he used the 1172 door on those occasions. The police would have reported that he had stopped at 1176 Harrison Boulevard if he had used the 1176 door, since there is no reason to think that the police knew during the course of surveillance that the second floor apartment at 1172 could be entered through the 1176 door. Given the existence of a single mailbox at the 1172 end of the porch, the police had probable cause at the time the warrant was issued to think that the defendant had dominion and control over both the first and the second floor at the 1172 address. To invalidate the warrant now because the police failed to perceive that the first floor contained an unoccupied separate apartment would be to demand certainty rather than probable cause.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 2, 1977.

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Philip W. Tone, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 76-1858 vs.

ELI GUSAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
No. H CR 76-57
Allen Sharp, *Judge*

On consideration of the petition for rehearing filed in the above-entitled cause, all of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition of defendant-appellant for a rehearing in the above-entitled appeal be, and the same is hereby Denied.